

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
Enfield, New Hampshire; Hartford and)
White River Junction, Vermont; and)
Keeseville and Morrisonville, New York)
)

MB Docket No. 05-162

To: Office of the Secretary

Attention: The Chief, Media Bureau

OPPOSITION TO MOTION TO DISMISS

NASSAU BROADCASTING, III, L.L.C. ("Nassau"), pursuant to Section 1.45(b) of the Commission's Rules, 47 C.F.R. § 1.45(b), hereby opposes the "Motion to Dismiss Petition for Rulemaking," filed July 7, 2005 (the "Motion") by Hall Communications, Inc. ("Hall"). The Motion, which amounts to no more than untimely repetition of arguments previously raised by Hall in its Comments in response to the Notice of Proposed Rulemaking in this matter,¹ is a clearly unauthorized pleading and without merit. Accordingly, the Commission should dismiss the Motion without further consideration.

I. The Motion Is Procedurally Defective

The Rules and the NPRM clearly contemplated only the following filings: comments and reply comments. 47 C.F.R. § 1.415(d). NPRM, at ¶ 7, Appendix at ¶ 4. The NPRM specifically contemplated the opportunity for the filing of a counterproposal, as long as it was advanced in initial

¹ Enfield, New Hampshire; Hartford and White River Junction, Vermont; and Keeseville and Morrisonville, New York (Notice of Proposed Rulemaking), 20 FCC Rcd 7587 (Aud. Div. 2005) ("NPRM").

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comments. Id., Appendix at ¶ 3(a). In fact, Hall advanced such a counterproposal. However, the rules provide for no additional pleadings other than comments and reply comments.

Nevertheless, Hall has taken it upon itself to file according to its own rules and procedures what amounts to an untimely and unauthorized second swipe at the NPRM. Moreover, Hall's Comments, in addition to its counterproposal, also addressed in detail the substance of the Motion's position – albeit an erroneous one -- that the NPRM should not have issued because of its prior expression of interest in filing for a Keeseville allocation. (Hall Comments and Counterproposal, pp. 2-4).²

As a general rule, once a pleading cycle closes, as it has in this NPRM under Section 1.415(d) of the Rules, additional pleadings may be filed only if specifically requested or authorized by the Commission. Llerandi v. F.C.C., 863 F.2 79, 87 (D.C. Cir. 1989) (affirming refusal to consider additional pleadings under similar provision in 47 C.F.R. § 1.45(c)). See also Edwin A. Bernstein, 6 FCC Rcd 6841, 6843 n.1 (Rev. Bd. 1991) (unauthorized pleadings dismissed).

Further, the repetitive nature of the arguments already raised in Hall's Comments can only lead to the inescapable conclusion that the Motion is frivolous and seeks to advance Hall's private interest in applying for a Keeseville station – separate and apart from the fact that the public would be served by adoption of the proposed rule which would allocate a higher class, first transmission service at Keeseville. Moreover, consideration of this frivolous Motion will only lengthen the time to resolve the NPRM. The Commission has cautioned that it will review carefully frivolous pleadings or those filed for purposes of delay, which are specifically prohibited by Section 1.52 of the Rules, 47 C.F.R. § 1.52. See Public Notice, 11 FCC Rcd 3030 (1996), where the Commission

² As previously noted by Nassau in its Reply Comments, filed June 14, 2005, Nassau made clear reference to the Commission's earlier Keeseville decision, Keeseville, New York, Hartford and White River Junction, Vermont, 19 FCC Rcd 16106 (Aud. Div. 2004), on several occasions in its Petition for Rulemaking. If the Commission had considered the Nassau Petition as an impermissible reconsideration, the Commission would have dismissed the petition rather than issuing the NPRM. The issuance of the NPRM – where the Commission makes no mention of the issue -- is indicative that the Commission does not consider the Nassau Petition an untimely petition for reconsideration of Keeseville I.

reminded filers such as Hall that it “intends to fully utilize its authority to discourage and deter the filing of such pleadings and to impose appropriate sanctions when such pleadings are filed.” Id.

The Commission should, pursuant to its rules, dismiss the Motion as untimely and unauthorized.

II. Hall’s Claims Regarding Expression of Interest Are Without Merit

The Motion, as well as the Comments, overlooks the fact that unlike the cases cited by Hall, in the instant case, there will not be the loss or downgrade of a channel at Keeseville. Indeed, the NPRM proposes a higher-class channel for Keeseville. Thus, it is apparent that the principal concern of Hall is its private interest in the channel, rather than the public interest in the availability of a higher-class channel, as provided in the NPRM.

Further, even if the Commission were not to dismiss the Motion out of hand, Hall overreaches in arguing that its mere expression of interest in the vacant Keeseville allotment should block further consideration of the Nassau proposal, which would provide first transmission service to two communities (Enfield, New Hampshire and Morrisonville, New York), as well as retain a channel at Keeseville, which will provide a first local transmission service licensed to Keeseville.

Hall’s citation to the Martin³ case is incomplete, in that the Commission later revisited the matter. In its Bethel Springs case,⁴ which specifically incorporated and revisited the Martin case, despite the prior expressions of interest in a channel, the Commission still allowed a downgrade of a channel allotment because of first local service otherwise provided by the proposal.⁵ In the instant

³ Martin, Tiptonville, and Trenton, Tennessee, 13 FCC Rcd 17767 (Allocations Br. 1998), recon. den. 15 FCC Rcd 12747 (2000).

⁴ Bethel Springs, Martin, Tiptonville, Trenton and South Fulton, Tennessee, 17 FCC Rcd 14472 (Aud. Div. 2002).

⁵ Id. at 14476 (¶ 15).

case, were the Commission to grant the proposal as set forth in the NPRM, there would be first service to two additional communities and a higher class channel allocated to Keeseville.⁶

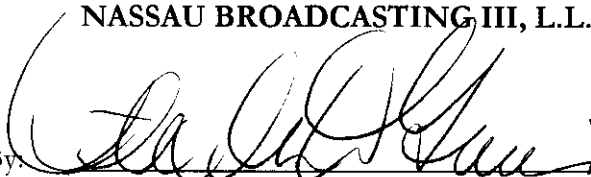
It should be noted that the Commission denied the original rulemaking petition to modify the FM Table of Allotments for White River Junction, Hartford and Keeseville because the proposal fell under Priority 4, the lowest of the FM allotment priorities.⁷ The proposal made by Nassau, as set forth in the NPRM, must be considered under Priority 3, a higher allotment priority, because it proposes first local service to two new communities,⁸ while retaining the channel allocation at Keeseville. The public interest benefit of first local service to two communities, combined with retention of a first local service in Keeseville, outweighs the change in the allotment at Keeseville.

III. Conclusion

The Motion is an unauthorized pleading and merits dismissal without further consideration on this basis alone. In any event, in its Comments in this proceeding Hall has already articulated its position that the Commission should dismiss the NPRM.

Respectfully submitted,

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Dated: July 21, 2005

⁶ NPRM, 20 FCC Rcd at 7589.

⁷ Keeseville, New York, Hartford and White River Junction, Vermont, 19 FCC Rcd 16106 (Aud. Div. 2004).

⁸ Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982)

CERTIFICATE OF SERVICE

I, Stella Lam, an assistant in the law firm of Patton Boggs LLP, Washington, D.C., hereby certify that on the 21st day of July, 2005, a copy of the foregoing **"OPPOSITION TO MOTION TO DISMISS"** is being sent via U.S. Mail, postage prepaid, and electronic mail, to the following:

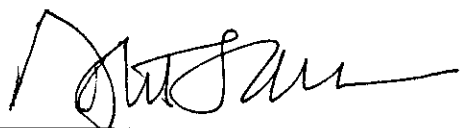
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